



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

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October 27, 2003

Mr. John Sowles  
Department of Marine Resources  
P.O. Box 8  
West Boothbay Harbor, ME 04575-0008

Dear Mr. Sowles:

This letter is in response to your request of the Fish and Wildlife Service (Service) to provide some information for Governor Baldacci's Task Force on Marine Aquaculture related to effects of aquaculture on wildlife and wildlife habitat in Maine. Below I respond to each of the areas that you raised in your September 19, 2003 electronic mail.

**1.) How does the Fish and Wildlife Service participate in a new aquaculture lease application process?**

Historically, the Service has not participated directly in the Department of Marine Resources' (DMR) leasing process. Instead, we play an active role in the federal permitting process, whereby prospective aquaculture projects must get a permit from the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act. As you know, however, these state and federal permitting processes do not act in a "vacuum" related to each other. There is often an exchange of information and ideas between state agencies and federal agencies (both the regulators and the natural resources agencies), although I think that exchange hasn't always been as open or well coordinated as perhaps it should be.

With the Corps' permitting process, the Service sometimes first learns of a pending aquaculture project through the receipt of the Corps' Public Notice (which typically has a 30 day comment period). In other cases, we become aware of a project before the Public Notice stage if the Corps chooses to share permit application materials with the federal resource agencies earlier in the federal permit process. And sometimes, the Service becomes aware of a potential wildlife issue related to an aquaculture project through our colleagues at the Maine Department of Inland Fisheries and Wildlife.

When the Service has concerns related to a trust resource (e.g., migratory birds or species listed under the federal Endangered Species Act), we will typically provide written comments to the Corps outlining our concerns and making recommendations to avoid or minimize impacts to wildlife resources. In some cases, we have recommended denial of a permit. The Service has no

legal authority to “veto” a Corps permit or impose particular conditions on a permit. We offer our recommendations and the Corps then makes the final permitting decision.

## **2.) What are the relevant laws that exist today that give the Fish and Wildlife Service authority to participate in the aquaculture permitting process?**

The federal Fish and Wildlife Coordination Act is the primary authority under which the Service plays a role in the Corps’ permitting process. Amendments enacted in 1946 require consultation with the Service and the fish and wildlife agencies of States where the “waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted ...or otherwise controlled or modified” by any agency under a Federal permit or license. Consultation is to be undertaken for the purpose of “preventing loss of and damage to wildlife resources.” For example, in 1993-94 the Service provided comments to the Corps on a proposal to place fish pens between Big Libby and Little Libby islands in Machias Bay. The Service was very concerned about the impacts that this project would have on seabirds nesting on both of these islands. At that time, the Service was also in the process of acquiring ownership of Little Libby Island from the U.S. Coast Guard for incorporation into the National Wildlife Refuge system. If fish pens were to be located so close off the shore of Little Libby Island, the Service was very concerned that the future suitability of the island as a seabird restoration project would be compromised. We recommended to the Corps that a 1/4 mile buffer be provided around both islands in which no aquaculture structures could be placed. In 1994 the Corps issued a permit without incorporating our recommendation for a buffer zone.

The federal Endangered Species Act (ESA) also requires the Corps to consult with the Service if an aquaculture project may affect an endangered or threatened species (e.g., the bald eagle). Although the ESA prohibits the Corps from authorizing a project that would “jeopardize the continued existence” of a listed species, it does not give the Service authority to veto a permit application or require major modifications to the project. For example, during the permitting process for the Stone Island salmon aquaculture project (1997), the Corps consulted with the Service under the ESA due to potential adverse affects on the bald eagle (which nests on Stone Island). Although the Service recommended denial of this permit application (because of impacts to eagles and other birds nesting on the island), the Corps ultimately issued a permit over our objection (which was perfectly legal).

## **3.) Have there been any recent improvements in the permit process?**

The permit process has actually been pretty stable since the joint state/ federal permitting process and guidelines were established in Maine in the early 1990's. There haven't been any changes in terms of how impacts to wildlife and wildlife habitat are factored into the permit review process.

The Corps’ portion of the joint application package contains “standard siting requirements” designed to offer some protection for wildlife species, such as setbacks from National Wildlife Refuge property. The Corps, however, considers these standards as only guidelines, and they have issued permits contrary to these standards and over the objections of the Service (e.g., Stone Island, Libby Islands). Should another project similar to either Stone Island or Libby Islands come before the Corps and DMR for permits today, I have no reason to believe that a similar outcome might not prevail (i.e., an outcome that is not fully protective of important wildlife resources using the islands).

**4.) Are there specific changes or improvements to the permitting process that the Task Force might consider recommending to the Governor or Legislature?**

Again, this comment is slanted mostly towards the Service's participation in the Corps' federal permitting process. By the time the Service is asked to review and comment on most finfish aquaculture projects, the applicant has already chosen their site and invested considerable time and money into baseline data gathering. If a conflict arises between the proposed site and wildlife habitat (e.g., bald eagle nest site, seabird nesting island, etc.), the applicant is well past the point of choosing a site and the Corps generally does not entertain much discussion of reviewing alternative locations. So, at that point there is generally nothing that can be done to avoid or minimize the disturbance impacts to the wildlife resources using the nearby land (usually an island).

Because the Service and the Maine Department of Inland Fisheries and Wildlife have worked closely together to identify Maine coastal islands and ledges that are important to wildlife, there would appear to be a very good opportunity for the wildlife agencies to work with the aquaculture industry **up-front** to avoid conflicts between important wildlife habitats and siting of new aquaculture facilities. Of the more than 4,000 islands and ledges off the coast of Maine, only about 15% are identified as having coastal wildlife habitat value and about half of those would be deemed as "high" value.

Currently, there isn't any provision under either state or federal law that provides sufficient protection for these important coastal wildlife habitats if an aquaculture company decides to pursue permits for a facility near one of these habitats. The Service is willing to work with the Task Force to develop language for a recommendation to provide better protection for important coastal wildlife resources, such as seabird nesting islands (e.g. a buffer zone around an island within which aquaculture facilities could not be located).

Thank you for the opportunity to provide these comments to the Task Force. If you have any questions, please give me a call at (207) 827-5938, Ext. 20.

Sincerely yours,

Wende S. Mahaney  
Fish & Wildlife Biologist

cc: Steve Timpano, MEDIFW - Augusta, ME